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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of: Main Case No.
RESIDENTIAL CAPITAL, LLC, et al., 12-12020-mg
Debtors.

- - - - -x

INVEST VEGAS, LLC, et al., Adv. Proc. No.
Plaintiffs, 16-01029-mg
-against-
21ST MORTGAGE CORPORATION, et al.,
Defendants.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

April 19, 2016
9:58 AM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

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In Adversary Proceeding 16-01029
Pre-trial conference
(CC: Doc. No. 56) Pre-motion conference

In the Main Case
Doc. #9583 (CC: Doc. No. 9669) Hearing Regarding ResCap
Borrower Claims Trust's Supplemental Objection in Support of
Objection to Proof of Claim No. 3695 Filed on Behalf of
Rosalind Alexander-Kasparik

Transcribed by: Hana Copperman

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A P P E A R A N C E S (Main Case):

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ALSO APPEARING:

SARA M. LATHROP, Residential Capital Estates
(TELEPHONICALLY)

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A P P E A R A N C E S (Adversary):

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BY: DIANE BRADSHAW, ESQ.

RESIDENTIAL CAPITAL, LLC, and INVEST VEGAS V. 21ST MORTGAGE CORP.

1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 We're here in Residential Capital, 12-12020. The
4 first matter this morning is an adversary proceeding, Invest
5 Vegas, LLC, v. 21st Mortgage Corporation. It's number 16-
6 01029. Who's appearing in that matter?

7 MS. BRADSHAW: Counsel for defendant --

8 THE COURT: Could you come up to the microphone,
9 please?

10 MS. BRADSHAW: Good morning, Your Honor. Diane
11 Bradshaw of the firm of Helfand & Helfand. We represent 21st
12 Mortgage Corporation, the defendant in these proceedings,
13 Invest v. 21st Mortgage Corporation. And this --

14 THE COURT: Is anybody appearing for Invest Vegas?

15 MS. BRADSHAW: No one has approached me.

16 THE COURT: Okay. Go ahead.

17 MS. BRADSHAW: We have recently had this matter
18 transferred. It was removed and then transferred, so it's new
19 in this court.

20 THE COURT: Right.

21 MS. BRADSHAW: But the basis of the transfer is that
22 this Court retained jurisdiction pursuant to the overall case,
23 12-12020, and we seek leave to file our motion for summary
24 judgment, because no triable issue of fact exists, and we can
25 show that. And at this point we can present evidence that the

RESIDENTIAL CAPITAL, LLC, and INVEST VEGAS V. 21ST MORTGAGE CORP.

1 automatic stay was violated by this transfer of property.

2 So at this point we just seek leave to file our motion
3 for summary judgment.

4 THE COURT: All right. So this case was originally
5 filed in state court in Nevada.

6 MS. BRADSHAW: Yes, Your Honor.

7 THE COURT: 21st Mortgage removed it to the federal
8 district court, who referred it to the bankruptcy court in
9 Nevada, who's now transferred it to this court.

10 MS. BRADSHAW: You have the whole story perfectly,
11 Your Honor.

12 THE COURT: Okay. And let me make sure I understand
13 the issue correctly. The issue is whether the foreclosure sale
14 on November 14, 2012, foreclosure on a homeowner's association
15 lien, whether that lien extinguished the note and deed of trust
16 on the subject property, which, at the time of the foreclosure
17 sale, you contend, was property of the debtors' estate, and
18 whether that foreclosure violated the automatic stay under
19 Section 362(a)(4).

20 MS. BRADSHAW: Yes, Your Honor. Perfectly.

21 THE COURT: All right. In doing a little research I
22 read the decision of the Nevada Supreme Court in SFR
23 Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408. It's
24 a 2014 decision from the Nevada Supreme Court, which, as I
25 understand it, under the applicable statutory law of Nevada, a

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1 nonjudicial foreclosure of certain homeowner's association
2 liens takes free and clear of a prior recorded mortgage. And I
3 take it it's the position of 21st Century Mortgage --

4 MS. BRADSHAW: Excuse me, Your Honor. It's just 21st
5 Mortgage Corporation.

6 THE COURT: I'm sorry. 21st Mortgage Corp acquired a
7 deed of trust from Berkshire Hathaway, which, in turn, had
8 acquired the deed of trust in a 363 sale approved by this
9 Court.

10 MS. BRADSHAW: Correct.

11 THE COURT: And if I understand the papers, the
12 foreclosure sale on November 14, 2012 occurred while the note
13 and deed of trust remained property of the estate, the Chapter
14 11 estate. It had not yet been transferred to Berkshire
15 Hathaway at that point.

16 MS. BRADSHAW: Correct, Your Honor.

17 THE COURT: Okay. And have you had any communication
18 with Invest Vegas's counsel?

19 MS. BRADSHAW: Not since the case has been
20 transferred. They have not contacted us. They have been
21 notified, and they were notified of today's hearing.

22 THE COURT: Okay. I take it, am I correct that it's
23 Invest Vegas's position that its acquisition -- its
24 foreclose -- its acquisition at a foreclosure sale, the
25 homeowner association lien essentially wiped out the prior

RESIDENTIAL CAPITAL, LLC, and INVEST VEGAS V. 21ST MORTGAGE CORP.

1 recorded deed of trust?

2 MS. BRADSHAW: That is their position.

3 THE COURT: Okay. All right. I'll grant you leave to
4 file a summary judgment motion.

5 MS. BRADSHAW: Thank you, Your Honor.

6 THE COURT: I saw in the papers, and I don't remember
7 which one. I read lots of the things that were filed from
8 Nevada.

9 (Pause)

10 THE COURT: Guess who was the -- am I correct it was
11 the Nevada Bankruptcy Court, before transferring the case --

12 MS. BRADSHAW: Yes, Your Honor.

13 THE COURT: -- stated, in substance, that the
14 foreclosure had the effect of extinguishing a security interest
15 with no deed or trust that was property of the estate.
16 However, that Court didn't decide whether the homeowner
17 association lien sale violated the automatic stay because of
18 Section 362(a)(4). Am I correct on that?

19 MS. BRADSHAW: That's exactly correct.

20 THE COURT: Okay.

21 MS. BRADSHAW: Yes, Your Honor.

22 THE COURT: All right. When will you be ready to file
23 your motion?

24 MS. BRADSHAW: Thank you, Your Honor. Appreciate it.
25 Have a good day.

RESIDENTIAL CAPITAL, LLC, and INVEST VEGAS V. 21ST MORTGAGE CORP.

1 THE COURT: No. When will you be -- when are you
2 going --

3 MS. BRADSHAW: Oh, I'm sorry.

4 THE COURT: I schedule matters, so we --

5 MS. BRADSHAW: I'm sorry. Oh, that's right.

6 THE COURT: You're not quite off the hook yet.

7 MS. BRADSHAW: Well, it's almost finished, so by early
8 next week?

9 THE COURT: Okay. That's fine.

10 MS. BRADSHAW: So do we need to call to schedule a
11 hearing first?

12 THE COURT: You do.

13 MS. BRADSHAW: Okay.

14 THE COURT: You --

15 MS. BRADSHAW: Call Deanna.

16 THE COURT: You do.

17 MS. BRADSHAW: Okay. Very good.

18 THE COURT: You call Deanna. You get a hearing date
19 from her.

20 MS. BRADSHAW: Very good.

21 THE COURT: Hang on just one second while I make note.
22 Let me look at one more thing.

23 Okay. Thank you very much.

24 MS. BRADSHAW: Thank you, Your Honor. Have a good
25 day.

RESIDENTIAL CAPITAL, LLC, and INVEST VEGAS V. 21ST MORTGAGE CORP.

1 THE COURT: All right. Mr. Wishnew?

2 MR. BUTTERFIELD: Good morning, Your Honor. Ben
3 Butterfield, Morrison & Foerster, for the Borrower Claims
4 Trust.

5 THE COURT: Thanks, Mr. Butterfield. So this is with
6 regard to the Trust's objection to claim 3695 of Rosalind
7 Alexander-Kasparik?

8 MR. BUTTERFIELD: Correct, Your Honor.

9 THE COURT: All right. Is Ms. Kasparik on the phone,
10 or is her counsel on the phone?

11 MR. CATE: Good morning, Your Honor. Allan Cate on
12 behalf of Rosalind Alexander-Kasparik.

13 THE COURT: All right. Just tell me your name one
14 more time.

15 MR. CATE: Allan Cate on behalf of Rosalind Alexander-
16 Kasparik.

17 THE COURT: Okay. All right. Mr. Butterfield?

18 MR. BUTTERFIELD: Your Honor, we also have Sara
19 Lathrop, our declarant, on the phone today.

20 THE COURT: Okay. All right. Go ahead.

21 MR. BUTTERFIELD: Your Honor, at a hearing on January
22 21st this Court sustained the Trust's objection to all but two
23 claims asserted by claimant: negligence and promissory
24 estoppel.

25 Unlike the other claims, which the Court dismissed on

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1 res judicata and collateral estoppel grounds, these two claims
2 were not dismissed, because the California trial court vacated
3 its judgment as to GMAC Mortgage on those claims. This Court
4 stated that it would consider these two claims on the merits
5 and requested additional briefing from the parties.

6 Your Honor, in accordance with the Court's
7 instructions, the Borrower Trust filed its supplemental
8 objection at docket number 9853. Claimant filed her response
9 at docket number 9644. And the Trust followed with its reply
10 at docket number 9669.

11 Your Honor, the Trust believes that the claimant's
12 promissory estoppel and negligence claims are both barred by
13 collateral estoppel and also fail on the merits.

14 Let me briefly go through the collateral estoppel
15 argument, and then I'll turn to the merits.

16 Your Honor, the basis for claimant's remaining claims
17 is a third amended complaint filed by claimant on April 14,
18 2015 with the California trial court. The third amended
19 complaint asserted two claims against Freddie Mac and GMAC,
20 promissory estoppel and negligence. Freddie Mac filed a demur
21 to the third amended complaint, which the California trial
22 court sustained by a minute order dated October 23, 2015.

23 Your Honor, the California trial court vacated the
24 minute order as to GMAC Mortgage on December 31, 2015.

25 THE COURT: Because GMAC hadn't joined in the demur?

RESIDENTIAL CAPITAL, LLC, and INVEST VEGAS V. 21ST MORTGAGE CORP.

1 MR. BUTTERFIELD: Correct, Your Honor.

2 Therefore the minute order has no res judicata effect
3 as to GMAC Mortgage.

4 Even though the trial court vacated the minute order
5 as to GMAC Mortgage, the order is still valid as to Freddie
6 Mac, and therefore can serve as the basis for collateral
7 estoppel.

8 Your Honor, the claimant fully litigated both of her
9 remaining claims against Freddie Mac before the California
10 trial court and lost. In paragraph 12 of her response, docket
11 9644, claimant admits that the minute order "effectively
12 decided identical issues" -- it's a quote -- to those before
13 the Court today.

14 Your Honor, the Court should not permit claimant to
15 now relitigate those same issues here, which would be a waste
16 of judicial resources and could potentially result in two
17 conflicting orders, both adjudicating the same issues and the
18 same facts.

19 THE COURT: Okay.

20 MR. BUTTERFIELD: If you have no further questions,
21 I'm going to turn to the merits.

22 THE COURT: Go ahead.

23 MR. BUTTERFIELD: I'll first address the promissory
24 estoppel claim, and then I'll address negligence.

25 Your Honor, as a preliminary matter, the Trust would

RESIDENTIAL CAPITAL, LLC, and INVEST VEGAS V. 21ST MORTGAGE CORP.

1 like to note that claimant's pleadings with the Court have not
2 addressed the Trust's objections to her promissory estoppel
3 claim. Therefore this portion of the Trust's objection is
4 essentially uncontested.

5 Under California law, to maintain a claim for
6 promissory estoppel a plaintiff must essentially plead two
7 things: a clear promise and detrimental reliance.

8 Your Honor, claimant has amended her complaint three
9 times, and has filed responses to our objection and
10 supplemental objection, but has entirely failed to allege any
11 clear promise by GMAC Mortgage. Instead, claimant relies on a
12 statement, allegedly made by a representative of Freddie Mac,
13 that she was "advised" on July 3, 2012, the day before the
14 trustee sale, that, and I quote, "the sale was being postponed
15 and that she should check the electronic system to make sure
16 the sale was actually postponed".

17 Your Honor, in order to have promissory estoppel you
18 have to have a clear promise, and a promise is an assurance
19 that someone will or will not do something. GMAC Mortgage made
20 no promises to claimant. And the statement allegedly made by
21 Freddie Mac is a mere statement of fact and does not amount to
22 a promise. Therefore the promissory estoppel claim fails,
23 because claimant has failed to allege a clear promise.

24 THE COURT: So the promissory estoppel claim was
25 dismissed with prejudice against Freddie Mac.

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1 MR. BUTTERFIELD: Correct, Your Honor.

2 THE COURT: Go ahead.

3 MR. BUTTERFIELD: Your Honor, there's a second prong
4 to promissory estoppel. That's detrimental reliance. With
5 respect to this element, claimant alleges that she refrained
6 from pursuing, and I'll quote, "other courses of action to stop
7 the foreclosure sale", including filing for bankruptcy,
8 exploring the possibility of refinancing or marketing or
9 selling the property.

10 Your Honor, claimant allegedly spoke with Freddie Mac
11 on July 3, 2012, the day of the trustee sale. Claimant has not
12 alleged that she actually took any steps towards filing a
13 bankruptcy that same day. For example, contacting a bankruptcy
14 lawyer. Furthermore, the Trust does not believe that
15 claimant's allegations that that same day she could have
16 refinanced the loan or marketed or sold the property are
17 credible.

18 Furthermore, claimant does not allege that GMAC
19 Mortgage or Freddie Mac instructed her to forego doing any of
20 these things in exchange for a loan modification. Therefore
21 the promissory estoppel claim fails, because claimant has
22 failed to allege detrimental reliance.

23 THE COURT: Okay.

24 MR. BUTTERFIELD: Turning now to negligence. Your
25 Honor, it is the Trust's position that the negligence claim

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1 must fail. First, GMAC had no duty to claimant. Second, even
2 if GMAC did have a duty, it did not breach that duty.

3 Claimant alleges that GMAC Mortgage, and I'll quote,
4 "affirmatively frustrated the loan modification process by
5 constantly mishandling claimant's applications, failing to
6 provide a consistent point of contact to whom she could
7 communicate, and continuously providing conflicting information
8 with regards to her application status and the sale date of her
9 home".

10 As a preliminary matter, Your Honor, other than
11 claimant's allegations with respect to the July 3rd
12 conversation with the representative of Freddie Mac, the
13 remainder of her allegations do not contain the specificity
14 required by Twombly. These are bare allegations. Claimant
15 does not allege any details about the constant mishandling, who
16 she spoke with, who she tried to speak with and was unable to
17 speak with. The conflicting information -- we don't have any
18 conflicting information other than with respect to the
19 allegations about the July 3rd conversation. As such, these
20 allegations failed to move these claims from conceivable to
21 probable, as required by Twombly.

22 Furthermore, while California courts recognize that
23 there is a split of authority over whether a lender owes a duty
24 of care once it agrees to consider a loan modification, the
25 "overwhelming weight of authority" characterizes loan

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1 modification as a traditional money lending activity that does
2 not impose a duty of care on the lender. For example, in the
3 Garcia case District Judge Phyllis Hamilton of the Northern
4 District of California observed that "there is a split of
5 authority" but ruled that in the absence of some guidance from
6 the Ninth Circuit a loan servicer, like any other financial
7 institution, owes no duty of care to a borrower in connection
8 with the loan modification process.

9 Your Honor, in our reply we discuss two other
10 California decisions from the past eighteen months that have
11 followed the Garcia approach. On fact, highly similar to those
12 here today.

13 Therefore, Your Honor, it's the Trust's position that
14 the claimant's negligence claims must fail. There's no duty.
15 And even if there was a duty, there's no breach of that duty.

16 THE COURT: Okay. Thank you. Mr. Cate?

17 MR. CATE: Thank you, Your Honor. To respond, with
18 respect to the collateral estoppel argument, I don't believe
19 that the way the allegations in the third amended complaint are
20 stated that GMAC and Freddie Mac are doing exactly the same
21 thing, but GMAC's alleged to be the active participant here,
22 and Freddie Mac's been alleged to be more of a passive
23 participant. So I don't think that the collateral estoppel
24 should hold for binding GMAC to the state court's earlier
25 ruling with respect to Freddie Mac. Different allegations,

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1 different parties.

2 With respect to the promissory estoppel claim and the
3 third amended complaint, I think we laid it out pretty well.
4 Paragraph 15, I go through the factors. There's a promise.
5 It's alleged there's a promise between the parties
6 participating in this public loan mortgage assistance program,
7 that they're going to help these borrowers. GMAC has accepted
8 participation in this program. They've promised to take money
9 on behalf of the borrowers. They're communicating with the
10 borrowers. I attached Exhibit A and, specifically, I guess, an
11 e-mail from June 29, 2012. Those e-mails, I guess, while not a
12 direct promise, are evidence of a promise or could be a promise
13 if Keep Your Home California is deemed to be, like, a subagent
14 of GMAC. I think there's a promise or indication of a promise
15 there for sure.

16 With respect to the duty based claims, the negligence,
17 there's new case law evolving on this point, and we've alleged
18 in the third amended complaint a lot of different details of
19 the scheme where GMAC is participating with Keep Your Home
20 California to offer loan modification and work out assistance
21 to borrowers. It's a complicated scheme. They're working
22 together. They're sharing a computer system. They're sharing
23 a communication system. They're transferring money within
24 their own internal apparatus. It's not just a traditional
25 lender-borrower relationship, as the Claims Trust argues. It's

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1 much more complicated than that. And we've alleged that and
2 shown details in the pleadings.

3 So for those reasons I believe that the negligence
4 claim and also that the promissory estoppel claim pass muster
5 and at least on a preliminary basis should be allowed to
6 proceed to trial.

7 THE COURT: All right. Mr. Butterfield, do you want
8 to respond?

9 MR. BUTTERFIELD: Ben Butterfield, Morrison &
10 Foerster, on behalf of the Borrower Trust.

11 First point, Your Honor, is that the allegations in
12 the third amended complaint are made against both GMAC Mortgage
13 and Freddie Mac together as defendants. There are no
14 allegations in that complaint that identify GMAC's role in the
15 process as being any different from the role that Freddie Mac
16 played in the process. The allegations are made against them
17 jointly, and therefore we believe that any ruling on the
18 allegations against Freddie Mac should collaterally estop any
19 other claims against GMAC Mortgage.

20 THE COURT: All right. I'm going to take the matter
21 under submission.

22 MR. BUTTERFIELD: Okay.

23 THE COURT: Thank you very much.

24 MR. WISHNEW: Thank you, Your Honor.

25 THE COURT: Anything else this morning, Mr. Wishnew?

RESIDENTIAL CAPITAL, LLC, and INVEST VEGAS V. 21ST MORTGAGE CORP.

1 MR. WISHNEW: That's it, Your Honor.

2 MR. BUTTERFIELD: All right.

3 THE COURT: All right. We're adjourned. Thank you
4 very much.

5 Thank you, Mr. Cate.

6 MR. CATE: Thank you, Your Honor.

7 (Whereupon these proceedings were concluded at 10:18 AM)

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I N D E X

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C E R T I F I C A T I O N

I, Hana Copperman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Hana Copperman

HANA COPPERMAN

AAERT Certified Electronic Transcriber CET**D 487

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: April 20, 2016

April 19, 2016

| | | | | |
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